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IN THE

Supreme Court of the United States

October Term, 1949
Nos. 248 and 249.

JOHN HOWARD LAWSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

DALTON TRUMBO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable Fred M. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioners, John Howard Lawson and Dalton Trumbo, respectfully urge this Honorable Court to grant them a rehearing upon orders filed April 10, 1950, denying their petitions for writs of certiorari to the Court of Appeals for the District of Columbia.

I.

Under the Facts of These Cases, the Punishment of Petitioners for Contempt Violates the Privilege Against Self-incrimination Guaranteed to Them by the Fifth Amendment to the Constitution of the United States. The Very Recent Decision of Alexander v. U. S. Shows That the Question of Self-incrimination Is a Substantial Ground for Granting of the Petitions Available to Petitioners and Not Previously Presented.

On February 4, 1950, contempt convictions were reversed by the Court of Appeals for the Ninth Circuit in *Alexander v. United States,* 18 Law Week 2373, ... F. 2d ....., on the grounds that the privilege against self-incrimination applied. The defendants there had refused to answer questions before a grand jury as to membership and organizational set up of the Communist Party. Upon the facts of petitioners' cases, a similar holding here is imperative as a matter of law.

Petitioners do not concede that prosecution because of advocacy or association is permissible under any law, within constitutional limitations. They assert the contrary. But the privilege against self-incrimination is designed to protect individuals against being forced to aid in their own prosecution, regardless of whether a valid conviction can be obtained. (*Hale v. Henkel,* 201 U. S. 43, 66.) In fact, the privilege serves its highest and historic purpose when it throws its protective cloak around those threatened with prosecution because of their beliefs or the expression thereof. (*Adamson v. California,* 332 U. S. 46, 88.)

The petitioners were called to the witness stand after the Committee had completed a full week of hearings (L. J. A.[1] 200-201; T. J. A. 417, 418.) During that week the Committee asserted and proceeded upon the proposition that the Communist Party advocates and plots to overthrow the Government of the United States by force and violence; the Committee took the position that the Communist Party is "pledged in word and deed to a foreign power," and that it is an illegal international political conspiracy (L. J. A. 239-42, 290-1, 295-6; Deft. Ex. 11, pp. 260, 547; T. J. A., Deft. Ex. 3, p. 647).

Petitioners offered to prove that a number of witnesses including the so-called "unfriendly ten" of whom petitioners were a part ,were called before the Committee because of what was stated by the Committee to be "the overwhelming evidence which was before the Committee that they were identified and active in a subversive and foreign conspiracy which goes under the misnomer of Communist Party of the United States"; that the Committee required the petitioners "to answer, if they could, the allegations which had been made against them"; and that the Committee members stated they were convinced that these witnesses refused to answer because they were Communists (L. J. A. 208-9, 263; Deft. Ex. No. 10, pp. 257, 480-1; 484-5; Deft. No. 11, pp. 260, 546-7; T. J. A. Deft. Ex. 3, p. 647). In this connection the Committee had, during the first week of hearings, put on testimony to the effect that petitioners were Communists (L. J. A. 224-8; T. J. A. 417-18, 492-3, 634).

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[1]In this petition for rehearing, the abbreviation "L. J. A." will be used for references to the Joint Appendix in petitioner Lawson's case, and "T. J. A." for the Joint Appendix in petitioner Trumbo's

Petitioners offered to prove that the Committee utilized the hearings for the object of "exposing" persons asserted by it to be Communists; that one of the objects of the Committee was to send persons to jail as a result of such exposure; that the Committee utilized its hearings to have penalties inflicted upon those "exposed"; and that one of the penalties sought to be imposed upon petitioners was their discharge and blacklisting from all employment in the motion picture industry (L. J. A. 258-61, 264-5, 314-15, 326, 339, 466-8; Deft. Ex. No. 10, pp. 257, 481-2, 513-26; T. J. A. 490, 622-29, 632).

In the *Trumbo* case the Committee had adduced evidence, prior to his taking the stand at the hearings, that petitioner was a member of the Screen Writer's Guild (T. J. A. 466-7, 625). It proceeded upon the theory that petitioner worked in the Screen Writers' Guild as a Communist and that the Guild was under the control of the Communist Party (T. J. A. 417-18, 462-3). Thus, the question regarding membership in the Guild falls into the same category as the one relating to membership in the Communist Party.

It therefore appears that at the very moment the Committee was insisting that petitioners answer the questions as to their alleged membership in the Communist Party, the Committee was asserting that such membership is a crime and further that petitioners were guilty of that asserted crime. It was demanding of petitioners that they confirm the Committee's contentions which, according to it, would establish petitioners' guilt of that crime.

The privilege against self-incrimination was designed to protect the people precisely in situations such as this—to prevent the use of governmental authority to compel

witnesses to testify against themselves, where they might be prosecuted because of their alleged beliefs or associations. In the case of *Adamson v. California, supra,* Mr. Justice Black recalled the trial of Mrs. Ann Hutchinson charged with holding unorthodox religious views and commented:

> "The lamentable experience of Mrs. Hutchinson and others contributed to the over-whelming sentiment that demanded adoption of the *Constitutional Bill of Rights.* The founders of this Government wanted no more such 'trials' and punishments as Mrs. Hutchinson had to undergo. They wanted to erect barriers that would bar legislators from passing laws that encroached on the domain of belief, and that would, among other things, strip courts and *all public officers of a power to compel people to testify against themselves.*" (Emphasis supplied.) (Page 88.)

It has now been found that petitioners refused to answer those questions. Petitioner Lawson predicated that refusal upon "the rights and privileges and immunity of American citizens" and particularly his rights under the Bill of Rights (L. J. A. 195-7). Petitioner Trumbo pointed to the relationship between the question concerning membership in the Screen Writers Guild and the one relating to membership in the Communist Party, urged that the questions were unconstitutional and demanded that the Committee's claimed documentary evidence against him be produced before he be required to answer the questions (T. J. A. 384-390).

Although the privilege against self-incrimination may be waived, there is no evidence of any waiver in these cases. The privilege may be waived by an explicit dis-

avowal of any claim to it (*Re Chapman,* 166 U. S. 661, 666; *Sinclair v. United States,* 279 U. S. 263, 289; *United States v. Murdock,* 284 U. S. 141). There has been no such disclaimer here.

It may be waived by a voluntary partial disclosure in which event the privilege under certain circumstances may not stand as a bar to further disclosure (*Raffel v. United States,* 271 U. S. 494; *Johnson v. United States,* 318 U. S. 189). If there is a disclosure which is involuntary, the privilege is not waived although it was not invoked at all at the time the disclosure was made (*State v. Conway,* 348 Mo. 580, 154 S. W. 2d 128; *cf. Powers v. United States,* 223 U. S. 303). Here, there was no disclosure at all, voluntary or involuntary. A refusal to answer at all is certainly no more a waiver than an answer under compulsion but without any claim of the privilege.

Where there is an immunity act, it was formerly held that a witness not acting under direct compulsion, must specifically claim the privilege if, thereafter, he is to have the benefit of the immunity statute (*United States v. Skinner,* 218 Fed. 879, overruled by *United States v. Monia,* 317 U. S. 424, 433). Otherwise, the testimony was considered to have been given voluntarily rather than in exchange for any statutory immunity.

However, as to witnesses before Congressional committees there is no immunity statute adequate to meet the requirements of the Fifth Amendment (R. S. Sec. 859, June 22, 1938, Chap. 594, 52 Stat. 943; U. S. C. Title 18, Sec. 3486; *Counselman v. Hitchcock,* 142 U. S. 547; Ebeling, "Congressional Investigations, p. 339, N. Y. 1928). Nor are petitioners relying upon any immunity act. Rather they rely upon the privilege granted by the

Fifth Amendment with respect to questions they *did not* answer, and which privilege has not been waived.

It is true that throughout the decisions on the subject of the Fifth Amendment in cases in which the witness answered questions there is persistent language to the effect that the protection may be waived if the privilege is not urged. In those cases it is the giving of testimony without the claim of privilege which leads to the conclusion that the testimony was voluntarily given; it is the voluntary testimony which constitutes the waiver.

This Court has recently held that the waiver of Constitutional rights is not lightly to be inferred (*Smith v. United States,* 337 U. S. 137, 150). In no case has it ever been held that a witness who refused to answer an incriminating question waived anything. Waiver applies where a witness proceeds to testify in the absence of an appropriate claim of the privilege. A refusal to testify may be unjustified, but it is not a waiver.

Even in cases where the witness testified the courts have not held him to a strict accountability for the form in which he makes his claim of privilege. Witnesses have been excused for "inartificiality or inexactitude in making the claim of privilege" (*United States v. Eisele,* 52 Fed. Supp. 105), and for statements made while "nervous or excitable" (*United States v. St. Pierre,* 128 F. 2d 979, 980). Even where a witness in answering questions makes no claim of the privilege at all, but does not advisedly intend to waive the privilege, it has been held that there is no waiver (*United States v. Bell,* 81 Fed. 830). It is voluntary testimony rather than a failure to claim the privilege which constitutes a waiver thereof (*United States v. De Pietro,* 36 Fed. Supp. 389). The principle of

waiver by the giving of testimony was summarized by one court as follows:

> "The immunity guaranteed by the Fifth Amendment, being personal to the witness and for his sole benefit, is deemed to be waived unless invoked by *some manifestation of his unwillingness to testify* at the time his testimony is given." (Emphasis added.) (*United States v. Mary Helen Coal Corp.*, 24 Fed. Supp. 50, 51.)

Thus, it has been held that even though the privilege was not expressly claimed, its benefit was available to one who had refused to permit his shoes to be taken for the purpose of comparison with certain tracks (*Davis v. State*, 131 Ala. 10, 31 So. 569); and to one who refused to produce books (*Sprague v. State*, 203 Ind. 581, 181 N. E. 507). In the cited cases a refusal *alone* has been held sufficient to gain the protection of the privilege against self-incrimination. The same principle has been applied in cases involving compulsory physical examinations whether outside of court (*State v. Haight*, 117 *Iowa* 65, 91 N. W. 935; *People v. McCoy*, 45 How. Pr. (N. Y.) 216) or in court (*Blackwell v. State*, 67 Ga. 76, 44 Am. Rep. 717; *cf. State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382 (affd. 164 U. S. 705)).

Moreover, in this case the petitioners have the same rights as defendants in criminal cases—for they were placed in that position by the Committee. That body charged that they had engaged in association declared by the Committee to be criminal; it stated that the purpose of the investigation was to expose the facts charged and to verify them through the mouths of the very persons

charged. Under such circumstances it matters not that the proceeding was not a criminal case but was a legislative investigation.

Where the investigating body or the party prosecuting the action charges that the witness is a criminal and asks him questions designed to establish this assertion, there is no need for any claim of the privilege beyond a mere refusal. Obviously the charging party cannot be heard to say that there is no danger of incrimination as its own charge reveals the danger. It has placed the witness in a position substantially identical to that of a defendant in a criminal case and he has an absolute right to refuse to answer.

Thus, where a state fire marshal conducted an investigation (not a criminal proceeding) in which he asserted that the witness had wilfully started a fire (arson), it was held that the privilege applied even though not claimed and the witness actually testified, because the witness was essentially in the same position as a defendant in a criminal case (*State of Minnesota v. Rixon,* 180 Minn. 573, 231 N. W. 217; see also, *State v. Sly,* 63 S. D. 162, 257 N. W. 113).

The same concept has been invoked in cases of bills of discovery in aid of actions at law or equity in which the plaintiff alleged facts which if true would establish the defendant's guilt of a crime. In such cases, it has been held that the bill of discovery is vulnerable to a demurrer or may be met by an answer in which it is pointed out that the questions call for answers which might incriminate—without any actual claim of the privilege on the part of the defendant (*United States v. Saline Bank,* 1 Pet. (26 U. S.) 100).

In such a case, *United States v. National Lead Co.*, 75 Fed. 94, the Court said:

> "Now the plaintiff alleges that the evidence of these unlawful acts is to be found in the books of the defendant, and for that reason asks for the order requiring their production. But because of that very reason the order asked for ought not to be granted."

See also:

Cartwright v. Green (1803), 8 Ves. Jr. 406, 32 Eng. Reprint 412;

Noyes v. Thorpe, 73 N. H. 481, 62 Atl. 787;

Marsh v. Marsh, 16 N. J. Eq. 391;

Black v. Black, 26 N. J. Eq. 431;

Adams v. Porter Cushing, 55 Mass. 170;

Mires v. Chrisman, 7 Monroe (46 Ky.) 422;

Northwestern Bank v. Nelson, 1 Gratton (42 Va.) 108.

It is also the rule that where a complaint in a civil case charges facts constituting a crime, the defendant may file an unverified answer without specifically claiming the privilege against self-incrimination and without giving reasons for so doing (*Sunley v. Badler*, 33 N. Y. S. 2d 642).

In such cases, inasmuch as the moving party relies on alleged facts which might subject the witness to prosecution on a criminal charge, the position of the witness is so akin to that of a defendant in a criminal case that the examination of the witness may not be pursued against

the will of the witness—even to the extent of requiring him to specifically claim his privilege (*Franks v. Reimer,* 9 N. Y. Supp. 273).

> "It seems to be well settled that in such an action (civil action alleging fraudulent conspiracy) an order for the examination of the party will be vacated when the object of it is to procure testimony to establish the fraud charged. This doctrine rests upon the provisions of the constitution of the state, which declares that no person shall be compelled, in any criminal case, to be a witness against himself." (*Andrews v. Prince,* 66 How. Pr. (N. Y.) 280.)

The rule that can be drawn from these authorities is that regardless of the character of the proceedings, if their purpose is to establish facts alleged or claimed by the investigatory body or moving party, which might subject the witness to a criminal prosecution, then as far as the Fifth Amendment is concerned the witness occupies the position of a defendant in a criminal case. He cannot be required to testify and the privilege automatically attaches when any attempt to compel him to admit claimed incriminatory facts is made. Under such circumstances, at the very least, the witness is free to refuse to answer and contempt proceedings may not be based on such refusal. This rule is as applicable to legislative investigations as to any other proceedings. In *Emery's* case (1871), 107 Mass. 72, the Court said:

> "The nature and purpose of the provisions are equally applicable to investigations conducted by the legislature itself, or by one of its branches, or by a

committee of its own members, as when conducted before the courts, or by commissioners, or other tribunals established by law. Such tribunals can in no case disregard this rule of protection. The legislature cannot, by the most formal and solemn enactments of law, authorize them to do it. If, then, the legislature cannot, by the formal enactment of all of its branches, subject a citizen to such compulsory disclosure, it is difficult to see on what ground of argument or inference, from necessity, propriety, or the nature of constitutional republican government, an authority can be deduced for either branch of the legislature to do so by its mere order."

The danger of prosecution of petitioners because of their alleged beliefs and association is beyond doubt. The Committee's position that the Communist Party is a criminal conspiracy advocating the overthrow of the government by force and violence and that petitioners were actively associated therewith, was tantamount to a charge that petitioners were guilty of a violation of the Smith Act, 18 U. S. C. 2385 (Act of June 28, 1940, ch. 439, title I, Secs. 2, 3, 5, 54 Stat. 670, 671). The very object of the proceedings was to establish such "guilt." Under such circumstances a witness need not answer questions relating to membership in the Communist Party (*Alexander v. United States, supra*). The very real danger of prosecution of alleged members of the Communist Party for violation of the Smith Act has now been demonstrated (*United States v. Foster* (S. D. N. Y.).

Moreover, the privilege against self-incrimination is available not only with respect to criminal cases but wherever the witness faces the threat of a penalty or forfeiture (*Boyd v. United States,* 116 U. S. 616; see also 29 Michigan L. Rev. 126, and cases therein cited). The privilege has been held applicable in the sustaining of a demurrer to a bill of discovery in a civil case in which the plaintiff relies upon allegations which might lead to the imposition of a penalty or forfeiture upon the defendant (*W. T. Raleigh Co. v. Hester,* 190 Miss. 329, 200 So. 250).

The loss of employment is a penalty or forfeiture within the meaning of the Fifth Amendment (*United States v. Lovett,* 328 U. S. 300).

Here the Committee used its investigation toward the end of "exposing" petitioners and thereby causing the forefeiture of the petitioners' jobs and contracts and the penalty of blacklist. The Committee called upon petitioners to give information upon which it expected to predicate this penalty and forfeiture. The privilege against self-incrimination was thereby invoked by the very asking of the questions.

The privilege being applicable petitioners may not, consistently with the Fifth Amendment, be punished for their refusal to answer.

II.

Morford v. U. S., No. 236, October Term 1949, Decided April 10, 1950, Requires the Reversal of the Conviction of Petitioner Lawson, Because the Trial Court Denied to Him Meaningful Opportunity to Prove the Actual Bias of the Government Employee Jurors as Well as the Opportunity Intelligently to Exercise Challenges for Cause and Peremptory Challenges. The Morford Decision Is an Intervening Circumstance of Controlling Effect.

Petitioner Lawson proposed some 17 questions on *voir dire* to prospective jurors which the trial court refused to allow. These questions are set out in Appendix 1 of the appendix. They were designed to test the existence of possible bias and prejudice, and to permit petitioner Lawson to exercise challenges intelligently, both for cause and peremptorily. Moreover the procedure established by the trial court for *voir dire* examination precluded fair opportunity for meaningful *voir dire* examination. Proposed jurors were not seated in the jury box when the *voir dire* questions as finally allowed by the Court, were put to them. Instead the panel was required, over petitioner's objection, to sit in the rear of the courtroom; between these talesmen and the defendant was a row of seats occupied by members of the press. (See Appendix 2 containing a fuller description of the actual trial scene.) Petitioner's request that the talesmen be seated in the jury box so that he might see them more readily and interrogate and study the character of their responses, was denied by the Court with the admonition:

> "The Court: Now, look. I am conducting this trial . . . I do not want any more reference to

that. I run this Court in the way I deem proper . . . I do not want any more reference to the Courtroom, the jurors or where the defendant sat." (L. J. A. 131.)

Efforts to examine the proposed jurors *individually* on the subject of their possible prejudice were cut off by the Court with the ruling:

> "The Court: Mr. Kenny, I do not like to interrupt but we have been all over this yesterday. The questions that you are now asking each individual juror are *identically the questions that you asked the panel yesterday,* and I think that the only purpose this morning is to select the jury, and you may exercise your challenges, unless there is something new has come up . . ." (Emphasis added.) (L. J. A. 159.)

This Court in *Morford v. U. S., supra,* said:

> "Preservation of the opportunity to prove actual bias is a guarantee of defendant's right to an impartial jury."

It is apparent that this qualification is the rationale for the majority position in the *Wood, Frazier* and *Dennis* cases. While rejecting the contention that government employment *per se* is a disqualifying factor, the majority softened the blow by reiterating adherence to what Chief Justice Hughes said in *Wood v. U. S.,* 299 U. S. 123, 134:

> "All the resources of appropriate judicial inquiry remain available in this instance as in others to ascertain whether a prospective juror although not exempted from service has any bias in fact which would prevent his serving as an impartial juror. In dealing with any employee of the government, the Court

would properly be solicitous to discover whether in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matter involved in the prosecution, or otherwise, he had actual bias and if he had to disqualify him."

Impartiality is not a technical conception. It is a state of mind, elusively difficult to establish. For the ascertainment of this mental attitude of appropriate neutrality, the widest range of inquiry must be permitted. The absence of such necessary neutrality of a talesman cannot conceivably be established where strictures are imposed, as here, upon counsel who seek to establish existence of bias. The authorities uniformly so hold.

The exclusion on *voir dire* of proposed questions which were not qualitatively dissimilar from those here denied, led this Court through Chief Justice Hughes to reverse the conviction in *Aldridge v. U. S.*, 283 U. S. 308.

Here petitioners were entitled to know whether the charges made by the Committee against petitioner that he was a Communist and whether the very question asked by the Committee: "Are you now, or have you ever been, a member of the Communist Party?" and the petitioner's response thereto, would create an attitude or frame of mind on the part of the proposed jurors different from his attitude or frame of mind if a question involving religion as distinguished from political affiliation had been asked and the categoric response not given (rejected questions 21, 22, 23, and 25).

Rejected questions numbered 61, 64, 65, 66, 67, 68, 69, 77, 78, 79, 80 and 85, are also designed to ascertain the

frame of mind of the proposed jurors in matters which might affect their judgment in this case.

Question number 40 was designed to determine whether fear of criticism following a verdict for acquittal might have deterred the talesmen. This question was critically important.

It is true, of course, that there is no exact rule prescribing the questions which may be asked a prospective juror on his *voir dire* in order to determine his qualification but the question is left largely to the sound discretion of the Court in each particular case. In the exercise of that discretion, however, the trial court should adapt the questions to the needs of each case in the effort to secure an impartial jury (*Corens v. State,* 185 Md. 481, 45 A. 2d 340). And any circumstance which may reasonably be regarded as rendering a person subject to challenge may be made the subject of questioning and a challenge for cause. Moreover the range of inquiry should be broad enough to afford counsel all information necessary to most intelligently exercise his peremptory challenge. In other words, an examination of a prospective juror on his *voir dire* is proper as long as it is conducted strictly within the right to discover the state of mind of the juror in respect to the matter in hand *or any collateral matter reasonably liable to unduly influence him* (*Corens v. State, supra*).

In *People v. DeLordo,* 350 Ill. 148, 182 N. E. 726, the Court said:

> "A defendant has the right to examine prospective jurors to ascertain their occupation, habits and association so far as they might tend to influence them in exercising judgment in the case. He has also the right to make any reasonable and pertinent inquiries

> to ascertain whether the minds of the prospective jurors are free from bias or prejudice, *so as to enable him to exercise his right of peremptory challenge intelligently.* (*People v. Redala,* 300 Ill. 392.) While a trial judge has a discretion to limit the extent to which attorneys may go in their examination of jurors, he has no right to deny a defendant the right to make all such reasonable inquiries of a juror as may enable him to determine whether or not such juror will be free from bias and prejudice in exercising his judgment in the case and as will enable the defendant to exercise his right of peremptory challenge intelligently. The trial judge in this case unduly restricted the attorneys for the defendants in their examination of the jurors."

A defendant is entitled to be tried by an unprejudiced and legally qualified jury to which end *the range of inquiry in the endeavor to impanel the jury should be liberal.*

U. S. v. Darby, 139 F. 2d 7;

Olguin v. Thygesen, 47 N. Mex. 377, 143 P. 2d 585;

Fedorchik v. Stewart, 289 Mich. 436, 286 N. W. 673;

Kizer v. State, 67 Okla. C. R. 16, 93 P. 2d 58;

Murphy v. State, 72 Okla. C. R. 1, 112 P. 2d 438.

The examination of the talesmen *en masse* while in the rear of the courtroom aggravated the prejudicial error committed in limiting the scope of *voir dire.* The total effect of the trial court's procedure in the matter of the examination of jurors on *voir dire* was to effectively stifle any attempted detailed examination of the talesmen by counsel for the purpose of developing possible grounds for challenge for cause, and for the purpose of intelli-

gently exercising the three peremptory challenges, thus depriving appellant of the constitutionally guaranteed right of a trial by jury, including the right to a selection of a fair and impartial jury (*People v. Barrett,* 207 Cal. 47, 276 Pac. 1003).

This precise form of examination was scrutinized and condemned as lacking in essential fairness in *People v. Estorga,* 206 Cal. at pp. 84-85, 273 Pac. 575, in the following language:

> "The collective examination of the entire panel in the body of the courtroom, and by a series of questions which may, for the greater part, be answered by silence on the part of the jurors, and, under circumstances like those in the case at bar, in which neither the People nor the defense had any opportunity to observe the jurors as they answered, is, in our opinion, such a wide departure from the due course and conduct of an examination as to call for the disapproval of this court."

And in *People v. Riordan,* 79 Cal. App. 496, 250 Pac. 190, the Court there said that when the jurors are examined *en masse* there is a considerable likelihood of a juror not fully understanding the question and remaining silent, when, should he give an answer, it might show ground for challenge.

The proposed *voir dire* questions which the Court disallowed and the procedure which the Court employed in the selection of jurors, resulted in a denial to petitioner of a meaningful opportunity to select the trial jury and to exercise intelligently his challenges both for cause and peremptorily, and requires a reversal under the authority of *Morford v. U. S., supra,* and the other cases hereinbefore cited.

III.

Petitioners Are Residents and Electors of the State of California; by the Laws of That State They Are Guaranteed the Right to Decline to State Their Political Affiliation. The House Committee on Un-American Activities, as an Agency of the Federal Government, Acted in Excess of the Lawful Bounds of Its Power When It Attempted to Coerce Disclosure of Political Affiliation Contrary to State Law Guaranteeing Freedom From Such Disclosure. This Is a Substantive Ground Available to Petitioners Although Not Previously Presented.

Petitioners are residents and electors of the State of California. By the laws of that State a voter is guaranteed the right to decline to state his political affiliation (California Elections Code, Section 221). That statute was in effect in October, 1947, when petitioners were called upon to testify before the House Committee on Un-American Activities and when that Committee asked each petitioner the question: "Are you now or have you ever been a member of the Communist Party?"

The Communist Party is a lawful political party in the State of California and electors of that State are free to affiliate with it (*Communist Party v. Peek*, 20 Cal. 2d 536, 127 P. 2d 889). And in California persons desiring to affiliate with that Party may decline to state publicly whether they have or have not so affiliated (California Elections Code, Section 221).

California is free to conduct her elections and regulate her electorate as she may deem wise; only as her action may be affected by the prohibitions of the United States Constitution may there be Federal intercession (*Smith v.*

Allwright, 321 U. S. 654). Thus, because of the Fourteenth and Fifteenth Amendments the State cannot discriminate as between electors on the unreasonable ground of race or color; nor, because of the Nineteenth Amendment may the State abridge the right to vote on account of sex. But these salutary constitutional provisions do not support the thesis that control over elections or the rights and privileges of State electors have thereby been delegated to the Federal Government.

The Constitution of the United States gives Congress no power to prescribe the qualifications of electors in the States (29 C. J. S. 25; *Breedlove v. Suttles,* 302 U. S. 277). While the foregoing principle is admittedly subject to the exceptions noted above and to the further exception that the right to vote for members of Congress is based on the Federal Constitution (Const. Art. 2, par. 32), nevertheless the State of California has supreme and exclusive power to determine the class of inhabitants who may vote, and whether they may or may not be compelled to disclose political affiliation. Over this question neither the Congress as a whole, nor the House Committee as a part thereof, has any jurisdiction.

In the case of *Mugler v. Kansas,* Mr. Justice Harlan in delivering the opinion of the Supreme Court, quoted with approval the following language from Mr. Justice McLean's opinion in the License Cases:

> "Mr. Justice McLean, among other things, said:
>
> "'A state regulates its domestic commerce, contracts, the transmission of estates, real and personal and acts upon internal matters which relate to its moral and *political* welfare. Over those subjects the Federal government has no power. . . .'" (*Mugler v. Kansas,* 123 U. S. 562, 658.)

The exclusivity of the State's control over its electorate and the party affiliation of such electors springs from a recognition of the basic principle that:

> "The right of local self government cannot be taken away, because all our constitutions assume its continuance as the undoubted right of the people, and as an inseparable incident to republican government." (*Britton v. Board of Commissioners,* 129 Cal. 337, 344, 61 Pac. 1115.)

The powers of the House Committee on Un-American Activities are assuredly not so unlimited as to permit it, even under the vague language of Section 121(b), Legislative Reorganization Act of 1946, to invade the area of political affairs and elector's affiliations exclusively reserved to the States under our system of government.

The right to be free to declare, or to decline to declare, political affiliation is no minor privilege. It is a part of the very process of forming, or not forming, as the electors choose, political parties:

> "No one can be so ignorant as not to appreciate the value, indeed, the necessity, of opposing political parties in a government such as ours. No one, it would seem, can be so thoughtless as not to realize that government by the people is a progressive institution which seeks to give expression and effect to the wisest and best ideas of its members. No statement is needed in the declaration of rights to the effect that electors holding certain political principles in common may freely assemble, organize themselves into a political party, and use all legitimate means to carry their principles of government into active operation through the suffrage of their fellows. Such a right is fundamental. It is inherent in the very form and

substance of our government, and needs no expression in its constitution." (*Britton v. Board of Commissioners, supra.*)

The House Committee acted in excess of the lawful bound of its power in demanding an answer to the question concerning petitioners' political affiliation and therefore each petitioner could rightfully have declined to answer that question (*Sinclair v. U. S.*, 279 U. S. 291—". . . a witness rightfully may refuse to answer where the bounds of the power are exceeded. . . .").

IV.

Five Justices of This Court in the Last Two Years Have Recorded Their Views That the Constitutional Question Presented in These Proceedings Is of General Importance and Should Be Settled by This Court. Under the Constitution and the Rules of This Court, Certiorari Should Be Granted. Intervening Circumstances Since the Filing of the Petitions for Writs of Certiorari Require a Review of the Constitutional Question Involved Herein.

This Court has recognized in the past the duty which the Constitution places upon it "to say where the individual's freedom ends and the State's power begins" (*Thomas v. Collins*, 323 U. S. 516, 529). In accordance with its constitutional obligation, the Rules of this Court provide in part that a writ of certiorari will generally be granted "where the United States Court of Appeals for the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or application of the Constitution, or a treaty or

statute, of the United States, which has not been, but should be, settled by this Court; or where that court has not given proper effect to an applicable decision of this court" (Rules of the Supreme Court, Rule 38, Ch. 4(c)).

The power of the House Committee on Un-American Activities under our constitutional system to compel the disclosure under oath of a citizen's private opinions, beliefs and associations is squarely presented in the proceedings herein. The failure of this Court to grant a writ of certiorari and settle this question of universal importance leaves undetermined an issue that will not down. Clearly, the denial of certiorari does not settle the question for as this Court has indicated "all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted" and "this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review" (Frankfurter, J., in *Maryland v. Baltimore Radio Show,* 338 U. S. 912, 919).

The question as to the power of the House Committee on Un-American Activities to compel the disclosure of private beliefs and associations has been presented to this Court in a number of cases on petitions for writs of certiorari. In a span of slightly over two years, five members of this Court have recorded their views that this question should be settled by the Supreme Court. In *Josephson v. United States,* 333 U. S. 838, Justices Douglas, Murphy and Rutledge were of the opinion that the petition for writ of certiorari should be granted. In *Eisler v. United States,* 335 U. S. 857, certiorari was granted, thus indicating that at least four Justices were

of the opinion that the same question as is presented herein should be answered by this Court. In *Eisler v. United States,* 338 U. S. 189, when the case was removed from the docket, Justices Jackson and Murphy noted their dissents and called for a settlement of this decisive constitutional question. In the proceedings here, Justices Black and Douglas have recorded their views that certiorari should be granted. It is respectfully submitted that technical considerations of different parties or changes in the composition of the Court should not stand as barriers to the grant of a petition for writ of certiorari where in a period of two years five Justices of this Court have considered a question to be of general importance "which has not been, but should be, settled by this Court." In substance, if not in form, the written and unwritten rules of this Court have been met, requiring the performance by this Court, it is respectfully submitted, of the duties imposed upon it by the Constitution. If, when the petition for a writ of certiorari was granted in *Eisler v. United States, supra,* the issue here was of sufficient general importance to warrant consideration by this Court, it has not become less so by the passage of time. As Justice Murphy stated (338 U. S. 189):

> "It is clear, however, . . ., that it is the importance of the legal issues, not the parties, which bring the case to this Court. Those issues did not leave when Eisler did. They remain here for decision; they are of the utmost importance to the profession and to the public."

Moreover, the opinion of Justice Jackson in the same case makes clear the anomaly between the grant of certiorari in the one case and the denial of certiorari in the instant case.

> "Under our practice, the grant of Eisler's petition meant that four Justices of this Court, at least, were in agreement that the questions he raised were of this description. His petition challenged the power of Congress and investigating committees, to hold, and to control the procedures of, investigations of this nature. These questions are recurring ones, certain to be repeated, for the grant of a review has cast doubt not only on the validity of Eisler's conviction but upon Congressional procedures as well. *No one can know what the law is until this case is decided or until someone can carry a like case through the two lower courts again to get the question here.*" (Emphasis added.)

It should be noted in this connection that while the petitioners here are only two in number, in actuality the decisions in these cases affect the rights of eight additional individuals. In the trial court, eight other members of the "Hollywood Ten" stipulated with the Government as to the facts of their own cases and submitted their cases subject to the "law of the decisions on appeal" in the *Lawson* and *Trumbo* cases, without entry of verdict or judgment "pending final determination of the appeals" in those two cases. The stipulations entered into between the Government and the eight other defendants protects their right to appeal from any judgment which may be rendered against them. Sound considerations of justice and the true administration of justice require, it is respectfully submitted, a settlement by this Court of

the fundamental constitutional question involved in all these cases. The assumption that this Court would act upon a full and complete record which squarely presented the issues motivated to a large extent the entry by these defendants into the stipulations. Since the denial of the writs of certiorari here is entirely inconclusive, it would appear to be an undue hardship to relegate the remaining defendants to further appeals to the lower court and to this Court for a final determination of the basic constitutional questions involved. The uncertainty created by the denial of the petitions for writs of certiorari will clog the judicial processes with burdens which a present decision by this Court could fruitfully resolve.

In addition to the fact that five Justices of this Court have recorded their views that the issues here are of general importance which should be settled in accordance with the rules of the Court, and the fact that the legal rights of eight other defendants have been attenuated by the decision denying the petitions for writs of certiorari, other circumstances have intervened since the filing of the petitions sufficiently important to warrant, it is respectfully submitted, the grant of these petitions for rehearing.

When this Court granted certiorari in *Joint Anti-Fascist Refugee Committee v. McGrath,* on March 13, 1950 (94 L. Ed. Adv. Op. 456), it was clear that more than four Justices of this Court believed that a serious question had been raised as to the scope of the Government's power to institute a "loyalty" program with due regard to the freedoms guaranteed by the First Amendment to the Constitution and the liberties protected by the Fifth Amendment to the Constitution. The same views undoubtedly obtained when this Court granted certiorari

in *Parker v. County of Los Angeles,* 337 U. S. 929, a state case involving liberties guaranteed by the due process clause of the Fourteenth Amendment. Indeed, it was so explicitly stated when the *Parker* case was held not ripe for constitutional adjudication (338 U. S. 327).

There is no basic distinction between the "loyalty oaths" involved in the aforesaid cases and the proceedings here. In each, the citizen's claim is that he is being compelled under oath by governmental bodies, be they legislative or executive, to reveal his private opinion, beliefs and associations in violation of rights guaranteed to him by the Constitution. The failure to vacate the decision of the court below leaves Congressional committees free through the process of investigation, to impose a loyalty check upon any person in these United States. Such a process is infinitely broader in scope than those which this Court has indicated merit review by this Court. By the grant of certiorari in one type of case and the denial of certiorari in another, when in substance, they are the same, "no one can know what the law is."

The result of the denial of certiorari in these cases, therefore, is to let loose upon the country a "loyalty" hunt and purge whose scope and consequences are fearsome to contemplate. More than one Justice of this Court is aware of the "prevailing pattern" of thought control, intimidation and harassment of liberal men and women now sweeping the country. The denial of certiorari in the cases here is a green light for the "village tyrants" to pursue a course which recent history teaches us can have only disastrous results for our democratic institutions. No citizen is free now, as a result of this Court's action, from inquiry into his ideas and associations. Each citizen

and his family are now the prey of any governmental official who may with impunity pry into their private lives and subject them to the ostracism of the community with the stigma of disloyalty. The list of one million "subversives" upon which the House Committee on Un-American Activities prides itself has now been permitted unlimited growth.

Because of the uncertainty created by this Court's action, the legal remedies afforded citizens against inroads into their liberties have become largely illusory. In Maryland, New York, New Jersey, California, Washington and Nevada cases are wending their way through the courts involving issues basically the same as those involved here. Sharp disagreements have been expressed by the different lower courts as to the constitutionality of measures requiring loyalty oaths and directing legislative and grand jury investigations into political beliefs of citizens. In the halls of Congress, a compulsory registration measure for all citizens commonly known as the Mundt-Nixon bill teeters on the brink of passage as outstanding constitutional law experts express their doubts as to its validity. So extreme has this rampage against the liberties of the people grown, that men high in office are not immune, with a resultant marked increase in international tensions. It is respectfully submitted that to a large extent the pattern of fear, intimidation and uncertainty now prevalent in the country is due to the failure of this Court decisively to settle this important constitutional question for the benefit of the public, the judiciary, the legal profession, and governmental officialdom as well.

The importance of this question and the need for its determination have been manifested in urgent manner,

Scores of briefs *amici curiae* have been submitted to this Court on this sole fundamental issue pointing to the dire need for a determination by this Court. These briefs have been signed by outstanding scientists, artists, trade union leaders, religious leaders, publishers, educators, scholars, lawyers and public citizens. The organizations whose briefs have been filed contain memberships which run in the hundreds of thousands, composed of citizens of the most diverse political, social and religious beliefs. It is fair to state that not a single newspaper, periodical or magazine in the country has failed to comment at one time or another upon the activities of the House Committee on Un-American Activities. Virtually every newspaper editor in the nation has assured the public that the question of the Committee's powers would be the subject of scrutiny by the Supreme Court of the United States.

The question raised in these proceedings has been the subject of extended discussion among the legal profession. The vast amount of legal literature issued in the last two years on the issues framed in these proceedings bears witness to the serious doubts existing in the minds of the legal profession concerning the apparent unlimited power of the House Committee. Throughout these writings there runs the constant refrain—"the question will have to be settled by the Supreme Court of the United States." In only the last two years, the following articles have appeared: McGeary, M. N., *Congressional Power of Investigation* in 28 Nebraska L. Rev. 516 (1949); Meader, G., *Limitations on Congressional Investigations* in 47 Michigan L. Rev. 775 (1949); Boudin, L. B., *Congres-*

sional and Agency Investigations in 35 Virginia L. Rev. 143 (1949); Shull, C. W., *Answer the Question: The Congressional Witness and His Quandary* in 23 Temple L. Q. 117 (1949); White, L. W., *Conflict Between Investigatory Powers of Congress and Constitutionally Guaranteed Individual Liberties* in 6 Washington & Lee L. Rev. 66 (1949); *Limits on Congressional Investigations* in 22 So. Calif. L. Rev. 464 (1949); Rudd, M. S., *Congressional Power of Investigation and Freedom of Speech* in 17 University of Cincinnati L. Rev. 264 (1948); Prescott, J. W., *Contempt Proceedings* in 1 Baylor L. Rev. 212 (1948); Davian, R. F., *House Committee on Un-American Activities, etc.,* in 37 Georgetown L. J. 104 (1948); Barlow, Jr., R. A., *Investigation of Political Beliefs* in 27 Nebraska L. Rev. 601 (1948); Murphy, Jr., E. E., *Legislative Contempt Power* in 26 Texas L. Rev. 816 (1948); Note, *Powers of Congress to Conduct Investigations Into One's Political Beliefs,* 22 Temple L. Q. 227 (1948); 34 Virginia L. Rev. 460 (1948); Note, *Separation of Powers—Congressional Investigatory Action,* 2 Rutgers University L. Rev. 125 (1948); Note, *Un-American Activities Committee,* 1 Vanderbilt L. Rev. (1948); Nutting, C. B., *Freedom of Silence* in 47 Michigan L. Rev. 181 (1948); Note, *Congressional Investigating Committee* in 16 George Washington L. Rev. 265 (1948); Notes, *Contempt of Congress* in 14 Brooklyn L. Rev. 276 (1948); 36 Illinois Bar J. 490 (1948); 20 Mississippi L. J. 81 (1948); Note, 96 University of Pennsylvania L. Rev. 381 (1948); Note, *Un-American*

Activities Committee, 43 Illinois L. Rev. 253 (1948); Martin, L. Ed., *Investigatory Powers of Congress* in 26 Washington University L. Q. 531 (1947); Note, *Constitutional Limitations on the Un-American Activities Committee,* 47 Columbia L. Rev. 416 (1947); Note, *Congressional Contempt Power,* 14 University of Chicago L. Rev. 256 (1947).

From all walks of life, therefore, both professional and public, has come the urgent request that this Court decide the most significant constitutional question to come before it in the last three decades. No one can measure what permanent inroads on American liberties have already been made by the depradations of the House Committee on Un-American Activities. Nevertheless, as the call for more and more purges of the civil service grows in volume, as the conflicts between boards of regents and academic staffs over loyalty oaths rock the campuses, as scientists in larger numbers leave their vocations in protest against political surveillance, as individual acts of violence against liberal men and women increase in alarming numbers, it becomes clear that ominous social and political changes are taking place in our institutions.

These changes permitted and sanctioned by governmental agencies run afoul the international obligations solemnly undertaken by the Charter of the United Nations, of which the Government of the United States is a signatory, provides in part that "all Members . . . shall fulfill in good faith the obligations assumed by them in

accordance with the present Charter" (Article 2); that "with a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . (c) universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion" (Article 55); and "all members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55" (Article 56).

The Declaration of Human Rights passed and promulgated by the General Assembly of the United Nations on December 10, 1948, and heartily supported by the United States delegation provides in part:

> "Article 19: Everyone has the right to freedom of opinion and expression. This right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
>
> "Article 20: Everyone has the right to freedom of peaceful assembly and association."

The adherence of the United States to the Charter of the United Nations and the Declaration of Human Rights, the adherence of other countries to the Charter and Declaration, and the general American desire for international good will and cooperation cannot be ignored in

any consideration of the governmental policy of subjecting men to fine and imprisonment because they will not be forcibly coerced into revealing their political and trade union affiliations (compare dissenting opinion of Edgerton, J., in *Hurd v. Hodge,* 162 F. 2d 233, 245, reversed in 334 U. S. 24).

A national policy so deeply rooted in our institutions and the subject of binding international commitments is as much a part of the law of the land, it is respectfully submitted, as direct enactments of the legislature. The complaints of the petitioners here are that this fundamental policy of far-reaching domestic and international significance has been perverted by officials of government. This Court has the constitutional responsibility of seeing to it that such national policy is unobstructed (compare, *United States v. Pink,* 315 U. S. 203). Failure by this Court to hear the appeals of these petitioners may be inexplicable to the peoples and nations of the world and inconsistent with the positions taken by our representatives at home and abroad regarding universal respect for and observance of human rights.

Conclusion.

There are no considerations, it is respectfully submitted, which can outweigh the need for this Court to settle the constitutional question involved in these proceedings, a question "ripe for adjudication" and required to be settled by the mandate imposed by the Constitution upon this Court.

For the reasons herein set forth this petition for rehearing should be allowed and the petitions for writs of certiorari to the Court of Appeal for the District of Columbia be granted.

Respectfully submitted,

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Certificate of Counsel.

The undersigned is one of counsel for the petitioners Lawson and Trumbo, and one who has prepared the within petition for rehearing. In my judgment this petition is presented in good faith and is restricted to the grounds specified in Rule 33 of the Supreme Court. It is not interposed for delay.

ROBERT W. KENNY.

APPENDIX 1.

Voir Dire Questions Disallowed:

21. Supposing that a man were charged with contempt of Congress for allegedly refusing to answer the question: "Are you now, or have you ever been, a member of the Catholic Faith?" Would your attitude or frame of mind toward such a defendant be any different than your attitude or frame of mind toward the defendant, Mr. John Howard Lawson? (DENY.) (L. J. A. 104.)

22. Supposing that a man were charged with contempt of Congress for allegedly refusing to answer the question: "Are you now, or have you ever been, a member of the Protestant Faith?" Would your attitude or frame of mind toward such a defendant be any different than your attitude or frame of mind toward the defendant, John Howard Lawson? (DENY.) (L. J. A. 104.)

23. Supposing that a man were charged with contempt of Congress for allegedly refusing to answer the question: "Are you now, or have you ever been, a member of the Jewish Faith?" Would your attitude or frame of mind toward such a defendant be any different than your attitude or frame of mind toward the defendant, John Howard Lawson? (DENY.) (L. J. A. 104.)

25. Do you believe that man who it is claimed is a member of the Communist Party has any lesser right with respect to his politics and his political affiliations, than a man who it is claimed is a member of the Democratic Party? (DENY.) (L. J. A. 105.)

40. Do you feel it is your obligation as a juror sitting in an American Court of Justice, to render a verdict of acquittal if the evidence fails to establish guilt beyond a

reasonable doubt, even though you might thereby be subjected to criticism by some people? (DENY.) (L. J. A. 106.)

61. Would you be prejudiced against Mr. Lawson because he took the position that he should be permitted to answer questions in his own words and in his own way, without being limited by the Committee to a "yes" or "no" answer? (DENY.) (L. J. A. 110.)

64. Do you believe that a Congressional Committee has the right to be arbitrary and unreasonable in its procedure towards any witness before it? (DENY.) (L. J. A. 110.)

65. Do you believe that witness before a Congressional Committee is entitled to protest against any arbitrary conduct of any discrimination by such a Committee? (DENY.) (L. J. A. 110.)

66. Do you have any prejudice against a private citizen who is before a Congressional Committee as a witness and who protests because he is denied the right to make a statement when other witnesses were permitted to make theirs? (DENY.) (L. J. A. 110.)

67. Do you believe that a Congressional Investigating Committee can do no wrong? (DENY.) (L. J. A. 110.)

68. You agree, don't you, that a Congressional Commitee is limited by the Constitution of the United States and by the resolution which has created it? (DENY.) (L. J. A. 110.)

69. Do you believe that an individual has certain private rights which no Congressional Committee can inquire into? (DENY.) (L. J. A. 110.)

77. Supposing it appears from the evidence that Mr. Lawson is alleged to be affiliated with a group which the

Committee claims to be un-American, but which group is actually set up for the purpose of advocating the passage of a Federal Anti-Lynching Law, would that prejudice you in any way against Mr. Lawson? (DENY.) (L. J. A. 111.)

78. Supposing it appears from the evidence that Mr. Lawson is alleged to be affiliated with a group which this Committee calls un-American, but which group is actually set up for the purpose of advocating the elimination of the poll tax, would that prejudice you in any way against Mr. Lawson? (DENY.) (L. J. A. 111.)

79. Supposing it appears from the evidence that Mr. Lawson is alleged to be affiliated with a group which this Committee calls subversive, but which group is actually set up for the purpose of advocating the adoption of a Federal Fair Employment Practices Act, would that prejudice you in any way? (DENY.) (L. J. A. 111.)

80. Supposing it appears from the evidence that Mr. Lawson is alleged to be affiliated with a group which this Committee calls subversive, but which group was actually set up for the purpose of defending the Scottsboro boys, would that prejudice you in any way? (DENY.) (L. J. A. 111.)

85. Suppose that the evidence in this case shows that certain witnesses before this Committee at this hearing were permitted to read prepared statements into the record; supposing it appears that Mr. Lawson attempted to read his own statement, but that the Committee refused to allow him to do so; suppose it further developed that Mr. Lawson sharply criticized the Committee for refusing to allow him to make a statement on his rights as an American citizen, would this fact prejudice you against Mr. Lawson? (DENY.) (L. J. A. 116.)

APPENDIX 2.

The Court Room Scene During Voir Dire:

Mr. Katz: We want the record to show our objection to the process by which Mr. Hitz proposed questions orally to the panel without our having had an opportunity in advance to interpose objections to those questions, in the manner in which the defense proceeded—that is, submitting an outline of proposed questions to the Government, the Court permitting the Government to be heard, and the Court ruling on the precise questions which the counsel for the defense could ask, before any questions were put to the jury.

The Court: Very well.

Mr. Katz: We should like the record further, Judge Curran, if you will be kind enough to do so, to contain some graphic depiction of the physical surroundings of the courtroom, showing where the defendant sat while Mr. Hitz interrogated the panel and where the panel itself sat, so that our record, if there is an appeal, may be presented in the form of giving the reviewing court as visually as possible a picturization of the setting.

We should like to have the record show, Mr. Hitz, if you will agree that this is the physical setup, that the panel—proposed jurors—sat in the rear of this courtroom, which is the Department No. 3; that between the panel of proposed jurors and the defendant there was a row, and there is a row, of seats occupied by ladies and gentlemen of the press; that between the panel—proposed jurors—and the ladies and gentlemen of the press there is then an aisle between the ladies and gentlemen of the press and the counsel table, at which the defendant and his

counsel sit; and that for the defendant to see the panel of jurors, he must look past this row of newspaper men and women.

The record should show our request that the impanelment of the jury take place in the form as follows: of having the proposed jurymen take and the box and be seated—

The Court: Now, look. I am conducting this trial.

Mr. Katz: I am not suggesting that you are not.

The Court: I do not want any more reference to that. I run this court in the way I deem proper.

Mr. Katz: I do not want to imply that you do not.

The Court: I do not want any more reference to the courtroom, the jurors, or where the defendant sat.

Mr. Katz: With the ruling, I shall, of course, refrain from making the statement which I should otherwise wish to make to complete the record. (L. J. A. 131-132.)